Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARTIN W. MYERS,

Petitioner,

v.

THOMAS C. BURNS, HOITE C. CASTON, K. RICHARD KEELER, PATRICIA SADLER MUNDELIUS, Trustees of the Urantia Foundation, and PHILIP A. ROLNICK, an individual represented to be a newly elected Trustee,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Urantia Foundation Declaration of Trust, its By-Laws, and the Urantia Foundation teachings provide for contractual due process requiring written charges and a fair, due process hearing before a trustee can be removed?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
THE URANTIA FOUNDATION DECLARATION OF TRUST, ITS BY-LAWS, AND THE URANTIA FOUNDATION TEACHINGS PROVIDE FOR CONTRACTUAL DUE PROCESS REQUIRING WRITTEN CHARGES AND A FAIR, DUE PROCESS HEARING BEFORE A TRUSTEE CAN BE REMOVED	13
CONCLUSION	24
APPENDICES	*infra*

TABLE OF AUTHORITIES

Cases PAGE(S)

American Rubber & Plastic Corp. v. First National Bank of Chicago, 50 Ill.2d 172 (1971) .. 14

Duldulao v. St. Mary of Nazareth Hospital, 115 Ill.2d 482 (1987) 17, 18

Eiche v. Ill. Nat. Bank & Trust Co., 84 Ill.App.3d 535, 406 N.E.2d 210 (1980) 14

First National Bank of Chicago v. Canton Council, 426 N.E.2d 1188 (Ill. 1981) 14

Ford v. Newman, 77 Ill.2d 335, 396 N.E.2d 539 (1979) 13

Hill v. Norfolk & Western Ry. Co., 814 F.2d 1192 (7th Cir. 1987) 23

Kaiser v. Dixon, 127 Ill.App.3d 251 (1984) 17, 18

Matter of Estate of Steward, 134 Ill.App.3d 412, 480 N.E.2d 201 (1985) 13

May v. May, 167 U.S. 309 (1897) 22

Polk v. Board of Trustees of Police Pension Fund of City of Park Ridge, Illinois, 253 Ill.App.3d 525 (1st Dist. 6th Div. 1993) 9, 10, 18, 20, 23

Robinson v. Ada S. McKinley Community Services, 19 F.3d 359 (7th Cir. 1994) 17

Storkan v. Ziska, 406 Ill. 259, 94 N.E.2d 185 (Ill. 1950) 14

Stuart v. Continental Ill. Nat. Bank & Trust, 68 Ill.2d 502, 369 N.E.2d 1262 (1977) 13

Other Authorities

Restatement (Second) of the Law of Trusts, § 187 ..... 11, 21, 22

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The Petitioner respectfully requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, to review that Court's decision and opinion entered on April 9, 1996 (App. A), with a subsequent denial of Petition for Rehearing by the United States Court of Appeals for the Seventh Circuit, on May 6, 1996 (App. B).

OPINIONS BELOW

On April 9, 1996, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court, Northern District of Illinois, Eastern Division, entered on May 9, 1995 (App. C), whereby the United States Court of Appeals for the Seventh Circuit ruled that the United States District Court for the Northern District of Illinois, Eastern Division, appropriately granted the respondents' motion for summary judgment.

The United States Court of Appeals opinion affirming the United States District Court for the Northern District of Illinois, Eastern Division, in granting the respondents' motion for summary judgment was based upon the legal thesis that the settlor's intention was expressed in the Urantia Foundation Declaration of Trust and its By-Laws when the petitioner was removed as trustee from the Urantia foundation without requiring written charges and a fair due process hearing before removal as trustee from the Urantia Foundation.

On May 6, 1996, the United States Court of Appeals denied petitioner's petition for rehearing.

JURISDICTION

1. The decision of the United States Court of Appeals for the Seventh Circuit was entered on April 9, 1996.

2. The denial of the petition for rehearing by the United States Court of Appeals for the Seventh Circuit was entered on May 6, 1996.

3. The Petition for Writ of Certiorari was filed less than 90 days from the denial of the Petition for Rehear-

ing by the United States Court of Appeals for the Seventh Circuit, said denial occurring on May 6, 1996.

4. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On August 22, 1992, the then trustees of Urantia Foundation, Respondents Hoite C. Caston, K. Richard Keeler, and Patricia Sadler Mundelius, commenced an action to remove the petitioner, Martin W. Myers, as a trustee of Urantia Foundation, wherein petitioner read a written statement, wherein he stated ". . . [B]eing a trustee of Urantia Foundation is a serious responsibility and my ability so to serve has now been brought into question. Because of this, rather than resign, I wish to proceed with the removal proceedings wherein we all shall have full opportunity to review my performance and your objections related to it."

In conjunction with the August 22, 1992, hearing for removal of Martin W. Myers, petitioner, as a trustee of Urantia Foundation, the petitioner was unaware that he was to be confronted with numerous oral charges without being provided the opportunity to respond properly, and he advised the trustees in the presence of Urantia Foundation legal counsel Quin R. Frazer that he did not comprehend the nature of those charges.

In that August 22, 1992 removal hearing, Martin W. Myers, petitioner, requested that he be provided written charges in order to have the fair opportunity to respond to such charges.

On August 29, 1992, the petitioner was provided the opportunity to present a statement to the trustees of Urantia Foundation.

After petitioner presented his written statement, the respondent, K. Richard Keeler, orally asked numerous questions of the petitioner and orally accused the petitioner of numerous infractions, which surprised the petitioner, with an appropriate denial by the petitioner.

After the oral inquisition of the petitioner by the respondent, K. Richard Keeler, the Board of Trustees voted unanimously to remove the petitioner, Martin W. Myers, as a trustee of Urantia Foundation.

On September 28, 1992, the petitioner addressed a letter to respondents Patricia Sadler Mundelius, Thomas C. Burns, Hoite C. Caston, and K. Richard Keeler, contesting the charges as being unfair.

In response to the correspondence of September 28, 1992, Urantia Foundation president, respondent Patricia Sadler Mundelius, directed a letter to the petitioner, dated October 9, 1992, in which she stated to the petitioner that the trustees had determined to remove the petitioner from the Board of Trustees of Urantia Foundation.

On October 12, 1992, the petitioner responded to Urantia Foundation president Mundelius' letter, stating that he did not fully understand the charges, and that it was only fair that "the trustees provide written charges and an opportunity for me seriously to address your concerns."

Prior to October 12, 1992, Martin W. Myers, in a September 4, 1992 correspondence, addressed to the respon-

dents a request for a written list of charges which was ignored.

A written set of charges was never prepared.

In the October 17, 1992 trustees' hearing, Hoite C. Caston orally read new charges to which the petitioner was unprepared to respond and to which he could not reasonably have been expected to have been prepared to respond; nevertheless, petitioner read his prepared statement.

In that October 17, 1992 hearing, there was a vote taken by the trustees unanimously voting to remove the petitioner, Martin W. Myers, as a trustee of Urantia Foundation.

On January 16, 1993, the trustees met again for purposes of removing the petitioner, and the petitioner filed a written response dated January 16, 1993, specifically indicating his objection to the continuation of the removal process as being biased.

In the January 16, 1993 statement, petitioner referred to philosophical concepts and teachings from the Foundation's principal publication, the Urantia Book, which by the terms of the Declaration of Trust Creating Urantia Foundation, Article II, and the By-Laws of Urantia Foundation, Article II, Section 2.4, the trustees are legally and morally bound to defend, to follow, to disseminate, and to not do or permit any act or thing which is inconsistent therewith or in degradation thereof, and which concepts and teachings establish a contractual due process property right requiring a fair and unbiased hearing.

In conjunction with the contractual due process concept requiring a fair and unbiased hearing, the Urantia Book, upon which Urantia Foundation was established, which

governs the trustees in the administration of the government of Urantia Foundation, is replete with teachings advocating that fairness and justice be adhered to in all facets of human endeavor. For example, the Urantia Book provides at page 614:

> There is no error greater than that species of self-deception which leads intelligent beings to crave the exercise of power over other beings for the purpose of depriving these persons of their natural liberties. The golden rule of human fairness cries out against all such fraud, unfairness, selfishness, and unrighteousness. Only true and genuine liberty is compatible with the reign of love and the ministry of mercy.

And the Urantia Book, page 1462:

> Meeting a poor man who had been falsely accused, Jesus went with him before the magistrate and, having been granted special permission to appear in his behalf, made that superb address in the course of which he said: "Justice makes a nation great, and the greater a nation the more solicitous will it be to see that injustice shall not befall even its most humble citizen. Woe upon any nation when only those who possess money and influence can secure ready justice before its courts! It is the sacred duty of a magistrate to acquit the innocent as well as to punish the guilty."

In the January 16, 1993 hearing, there was a vote taken by the trustees unanimously voting to remove the petitioner, Martin W. Myers, as a trustee of Urantia Foundation.

On February 16, 1993, defendant Hoite C. Caston, on behalf of the trustees of Urantia Foundation, directed a letter to petitioner stating, among other things, that petitioner could again present his position at the April 17, 1993 hearing, but further informing petitioner that the

trustees had unequivocally rejected petitioner's position, including petitioner's presentation of the facts, characterization of the trustees' actions, interpretations of the trustees' motives in initiating and carrying out removal proceedings against petitioner, without disclosing to petitioner what the facts, actions, and motivations were, all of which not only denied petitioner the opportunity to have a correct understanding of the pertinent facts, actions and motivations of the trustees, including the charges against him, but also rendered it impossible for petitioner to engage in any meaningful communication on petitioner's behalf concerning the trustees' efforts to remove petitioner as a trustee of Urantia Foundation, thus foreclosing any consideration of the issues and defeating any possibility of a fair hearing.

On April 17, 1993, the trustees again voted unanimously for the last time to remove the petitioner as a trustee of Urantia Foundation.

On May 13, 1993, the petitioner received from Urantia Foundation a Certificate of Removal of Trustee that had been filed with the Cook County clerk's office on April 20, 1993, which certificate states, among other things, notwithstanding the contents of the petitioner's January 16, 1993 written statement, "**. . . that after due deliberation and the exercise of fair and impartial judgment,** by the unanimous vote of all trustees present at said meetings Martin W. Myers was fully and permanently removed as a trustee of Urantia Foundation, **and a vacancy in the number of trustees is declared to exist.**" (emphasis supplied). Said Certificate of Removal of Trustee was dated April 17, 1993, and was signed by Respondents Thomas C. Burns, Hoite C. Caston, K. Richard Keeler, and Patricia Sadler Mundelius, and each

of the signature was notarized by Foundation legal counsel, Quin R. Frazer.

Under Article VII of the Declaration of Trust Creating Urantia Foundation, entitled Trustees and Government of Urantia Foundation, specifically Section 7.5, Removal of Trustee, the pertinent language is quoted: "Upon the execution and recordation of such certificate, a vacancy in the number of trustees shall be deemed to exist."

Philip A. Rolnick was elected a trustee of Urantia Foundation on April 17, 1993, three days before the April 20, 1993, recording of the Certificate of Removal of Trustee of the petitioner as a trustee of Urantia Foundation, with the result that the election of Philip A. Rolnick was invalid and there presently exists a vacancy.

The conduct of the hearings of October 17, 1992, January 16, 1993, and April 17, 1993, asking for the removal of the petitioner as a trustee of Urantia Foundation, violated the Declaration of Trust, the By-Laws, and the Urantia Book of Urantia Foundation, providing for contractual due process requiring a fair and unbiased hearing, as follows:

A. That such a contractual due process hearing exists is substantiated by the only prior removal proceedings in the Foundation's four decades of existence, in which the trustees adhered to their practice of following the Principle of Proper Procedures and specifically and deliberately decided that written charges were deemed to be a part of the due process to be accorded the accused trustee, including a step-by-step process whereby the accused trustee had at least three separate opportunities specifically to answer each charge and to confront his accusers face-to-face, which process was embraced by the then

trustees, significantly including two of the Foundation's original, founding trustees, Mr. William M. Hales and Ms. Edith E. Cook, who unanimously adopted and faithfully followed a written procedure including written charges, guaranteeing the accused full due process of law.

B. That written charges are required is supported by the Urantia Book, at 1990:

> Pilate, being keenly sensitive to the disrespectful manner of the approach of these Jews, was not willing to comply with their demands that Jesus be sentenced to death without a trial. When, therefore, he had waited a few moments for them to present their charges against the prisoner, he turned to them and said: "I will not sentence this man to death without a trial; neither will I consent to examine him until you have presented your charges against him in writing."

C. That, although the respondents do not administer the affairs of a public administrative agency subject to the requirements of due process under the Fifth and Fourteenth Amendments to the United States Constitution, nevertheless, under the Declaration of Trust, By-Laws, and the Urantia Book of Urantia Foundation, providing for contractual due process, such due process requires a fair trial and a fair tribunal, principles recognized in constitutional due process hearings governing public administrative agencies, *Polk v. Board of Trustees of Police Pension Fund of City of Park Ridge, Illinois*, First District, Sixth Division, September 10, 1993.

D. That, although the Respondents do not administer the affairs of a public administrative agency, subject to the requirements of due process under the Fifth and

Fourteenth Amendments to the United Stated Constitution, nevertheless, under the Declaration of Trust, By-Laws, and the Urantia Book of the Urantia Foundation, providing for contractual due process, such due process prohibits persons performing quasi-prosecutorial investigative functions from being members of a decision-making body, principles recognized in constitutional due process hearings governing public administrative agencies, *Polk v. Board of Trustees of Police Pension Fund of City of Park Ridge, Illinois.*

E. That the petitioner was denied a due process hearing, in that the respondents performed quasi-prosecutorial or investigative functions while also being members of the decision-making body to terminate the petitioner as a trustee, was stated by the petitioner, in the letter dated January 16, 1993, paragraph 3:

> One would expect that fiduciaries, such as the majority, would be eager to avoid even the appearance of these and other improprieties by insisting upon the highest standards of conduct and conscientiously adhering to basic principles of good faith behavior. This would seem especially so, since the majority sits as accuser, prosecutor, judge and jury, and would, therefore, want to take special precautions to insure fairness throughout the removal proceedings. But its actions have been to the contrary. By bringing false charges and failing to provide Martin with the basic protections of due process, the majority has repudiated fairness and equity and renounced its accountability to reasonable standards of conduct in its administration of the affairs of Urantia Foundation. In so doing, the majority has substituted license in the place of liberty, and has thus put itself in direct contravention of the teachings of the Urantia Book. Here, for the majority, the ends justifies the means.

The conduct of the hearings of October 17, 1992, January 16, 1993, and April 17, 1993, was in violation of the fiduciary and other high administrative standards of conduct and behavior imposed upon and required of the respondents by the creators of the Declaration of Trust Creating Urantia Foundation, as exemplified in and by Article II, Objects, and Article VII, Trustees and Government of Urantia Foundation, in and by Article II of the By-Laws of Urantia Foundation, and in and by the teachings of the Urantia Book, for the fair, honest, and equitable administration of the affairs of Urantia Foundation.

G. That, under §187, j, of Restatement (Second) of the Law of Trusts, it provides that trustees' decisions are subject to the review of a court for dishonest action, bad faith, unreasonable and arbitrary exercise of judgment, or improper motive, and thus, the respondents are to be held accountable by the court for their arbitrary and capricious exercise of discretion, bad faith, and their unreasonable judgment and improper motives in denying petitioner a contractual due process hearing as required by the intent of the creators of the Declaration of Trust Creating Urantia Foundation as exemplified in and by Article II, Objects, and Article VII, Trustees and Government of Urantia Foundation, in and by Article II of the By-Laws of Urantia Foundation, and in and by the teachings of the Urantia Book.

The actions of the trustees of Urantia Foundation of October 17, 1992, January 16, 1993, and April 17, 1993, to remove Martin W. Myers as a trustee of Urantia Foundation, were a flagrant and willful abuse of trust, being arbitrary, capricious, unreasonable, and biased when they denied the petitioner a contractual due process property right hearing consisting of written charges

and confrontation of witnesses for purposes of cross-examination, in accordance with contractual due process to which bias the petitioner referred in his letter dated January 16, 1993, page 2, paragraph 1:

> Not only does the majority proceed unfairly against Martin, impugning his character and dismissing his significant experience, but also, it does so hypocritically, knowingly harboring one of its own who has admitted actions in writing which show his unworthiness to continue to be a trustee, especially his unworthiness to sit in judgment on Martin. Martin requested this trustee's resignation immediately before the majority commenced to remove Martin, but this trustee sat—and still sits—as one of Martin's accusers. And the actions and behavior of the remainder of the majority are also subject to criticism. With Martin's performance as a trustee—let alone his qualifications—equal or superior to that of the majority, the majority's actions are all the more deceitful. It holds Martin to a higher standard of conduct and behavior than that which it has chosen to apply to itself.

The petitioner's reference to the bias relating to the unworthiness of one of the trustees to continue sitting as a trustee related to a certain document (the "Keeler document") given to petitioner on August 21, 1992, in good faith, independently of its author trustee Keeler, said document consisting of 22 typewritten pages containing information about Mr. Keeler, Mr. Keeler's 4-year-old daughter, Liberty, his daughter's mother, Mr. Keeler's former wife and her daughter, and their relationships with one another, which document Urantia Foundation demanded petitioner return.

In a separate proceedings that had been pending in the Circuit Court of Cook County, Illinois, in the matter en-

titled K. Richard Keeler, Plaintiff, vs. Martin W. Myers and Diane G. Elder, Defendants, 93 CH 3484, the Circuit Court ordered the petitioner, herein, to surrender the Keeler document to Keeler although the petitioner considered the document as a matter of public concern that should not have been surrendered.

REASONS FOR GRANTING THE WRIT

THE URANTIA FOUNDATION DECLARATION OF TRUST, ITS BY-LAWS, AND THE URANTIA FOUNDATION TEACHINGS PROVIDE FOR CONTRACTUAL DUE PROCESS REQUIRING WRITTEN CHARGES AND A FAIR, DUE PROCESS HEARING BEFORE A TRUSTEE CAN BE REMOVED.

In the United District Court for the Northern District of Illinois, Eastern Division, opinion, as affirmed by the United States Court of Appeals for the Seventh Circuit, the positions of both courts in affirming the respondents' motion for summary judgment is that the intention of the settlor, in this instance, as expressed in the Declaration of Trust and the By-Laws, did not require written charges nor a procedural due process hearing.

Basically, both courts' position is that any trustee can be removed without cause, with the consequence that no written charges and due process hearing are required.

There is no question that the limits of the trustees' powers are determined by the instrument which creates the trust. *Stuart v. Continental Ill. Nat. Bank & Trust*, 68 Ill.2d 502, 369 N.E.2d 1262, 1271 (1977), *Ford v. Newman*, 77 Ill.2d 335, 396 N.E.2d 539, 540 (1979), *Matter of Estate of Steward*, 134 Ill.App.3d 412, 480 N.E.2d 201,

203 (1985), *First National Bank of Chicago v. Canton Council*, 426 N.E.2d 1188, 1201 (Ill. 1981), *Storkan v. Ziska*, 406 Ill. 259, 94 N.E.2d 185, 189 (Ill. 1950), and *Eiche v. Ill. Nat. Bank & Trust Co.*, 84 Ill.App.3d 535, 406 N.E.2d 210, 212 (1980).

Therefore, the intention of a settlor of a trust is to be sought in the meaning of the language used as made manifest by various provisions of the instrument considered as a whole. *American Rubber & Plastic Corp. v. First National Bank of Chicago*, 50 Ill.2d 172 (1971), at 174.

The Declaration of Trust Creating Urantia Foundation describes the principal object of the trust in Article II as follows:

> 2.1 Principal Object: The object for which this Foundation is created is the promotion, improvement, and expansion *among the peoples of the world of the comprehension and understanding* of Cosmology and the relation of the planet on which we live to the Universe, of the genesis and destiny of Man and his relation to God, and *of the true teachings of Jesus Christ*; and for the inculcation and encouragement of the realization and appreciation of the Fatherhood of God and the Brotherhood of Man—in order to increase and enhance the comfort, happiness, and well being of Man, *as an individual and as a member of society*, through the fostering of a religion, a philosophy, and a cosmology which are commensurate with Man's intellectual and cultural development.
>
> 2.2 Concordant Objects: The concordant objects for which the Foundation is created are to perpetually preserve inviolate the text of the Urantia Book and *to disseminate the principles, teachings, and doctrines of the Urantia Book*. (Emphasis supplied.)

In conjunction with the object of the Declaration of Trust, the following By-Laws of Urantia Foundation, Article II, governing the Board of Trustees, are quoted:

> 2.5. *Qualification for Trustees*: To qualify for the office of Trustee, a person must have read the Urantia Book, be familiar with the teachings thereof, and sincerely and truly advocate the dissemination of such teachings. He shall execute the certificate accepting the duties and responsibilities of Trustee as set forth in the Certificate of Election of Trustee, and shall subscribe to the acceptance of these Bylaws.
>
> 2.4. *Removal of Trustees*: When in the opinion of a majority of the Trustees, any Trustee . . . has done or permitted any act or thing which is inconsistent with or in degradation of the teaching of the Urantia Book, . . . then the Trustees shall cast a ballot on the question of whether or not such Trustee should be removed.

Relative to By-Laws 2.4., Removal of Trustees, under Certificate of Removal of Trustee, the following pertinent language is quoted:

> Whereas, under the terms and provisions of said Declaration of Trust a Trustee may be removed by the unanimous vote in favor of such removal by all the remaining Trustees:
>
> Now, Therefore, the undersigned being all the presently qualified and acting Trustees of Urantia Foundation, except the Trustee hereby removed, do hereby certify that pursuant to said Declaration of Trust a meeting of said Trustees was duly and legally held on (*insert dates of meetings*) and at which meetings the following Trustees were present, to-wit:
>
> (Insert names of Trustees present)

> that after due deliberation and the exercise of fair and impartial judgment, by the unanimous vote of all Trustees present at said meeting (*name of Trustee removed*) was fully and permanently removed as a Trustee of Urantia Foundation, and a vacancy in the number of Trustees is declared to exist.

At the same time, with reference to the analysis of the provisions of the Declaration of Trust and By-Laws as stated herein, two other significant sections that must be addressed are Article VII, 7.5 and 7.7, of the Declaration of Trust Creating Urantia Foundation:

> 7.5 REMOVAL OF TRUSTEE: Any Trustee may be removed for any reason by a unanimous vote of the remaining Trustees, and upon the casting of such a unanimous vote of the remaining Trustees, they shall thereupon execute a certificate under the hands and seals of said remaining Trustees certifying to the casting of such vote and to the removal of such Trustee, and the same shall be filed for record as provided in paragraph 9.1. Upon the execution and recordation of such certificate, a vacancy in the number of Trustees shall be deemed to exist.
>
> 7.7. Action by Majority: Except as otherwise provided in this Declaration of Trust, the Trustees shall have the powers to act by a majority of their number as from time to time constituted, and the Trustees shall keep and preserve full minutes and other records of all their meetings, proceedings, and acts, and any Trustee dissenting from the majority of the Trustees shall have the right to have his dissent noted in such minutes or other record.

From the analyses of the provisions of the Declaration of Trust and the By-Laws of the Urantia Foundation, it is the contention of the petitioner that he has a contractual due process right to a fair and impartial hearing, re-

quiring written charges, based upon the Declaration of Trust Creating Urantia Foundation, Article II, 2.1, Principal Object, and 2.2, Concordant Objects, which provisions provide that the object for which the Urantia Foundation was created was to preserve perpetually the textbook of the Urantia Book, which textbook relates to the true teachings of Jesus Christ, which requires written charges.

In conjunction with 7.5, which merely requires that the majority of trustees vote for removal without even having any reason, that Declaration of Trust must be read with 2.1 and 2.2, the objects of the Urantia Foundation, and 7.7, which requires full record keeping, and 2.4 of the By-laws, which requires that there be a fair and impartial deliberation before the removal of a trustee.

Most importantly, By-Law 2.5 of Article II of the Urantia Foundation requires that a qualified trustee accept the duties and responsibilities of a trustee by having read the Urantia Book, being familiar with the teachings thereof, and by disseminating those teachings.

In defiance of Article II, By-Law 2.5, respondent trustees disregarded the teachings of the Urantia Book, which referred to written charges as alleged by the petitioner.

As a consequence, the petitioner has alleged a contractual due process right, which due process right was violated specifically by not providing the petitioner with written charges nor a fair due process hearing before removal, pursuant to *Duldulao v. St. Mary of Nazareth Hospital*, 115 Ill.2d 482 (1987), at 486-489, *Kaiser v. Dixon*, 127 Ill.App.3d 251 (1984), *Robinson v. Ada S. McKinley Community Services*, 19 F.3d 359 (7th Cir. 1994),

and *Polk v. Board of Trustees of Police Pension Fund of City of Park Ridge, Illinois*, 253 Ill.App.3d 525 (1st Dist. 6th Div. 1993), at 541-542.

In *Polk v. Board of Trustees of Police Pension Fund of City of Park Ridge, Illinois*, the Illinois Appellate Court concerned itself with a public agency, wherein the Illinois Appellate Court ruled that an administrative agency has to provide a fair and impartial hearing, and that officers conducting the hearing cannot be performing quasi-prosecutorial, investigative functions.

It was the position of the petitioner in the proceedings pending before the United States District Court for the Northern District of Illinois, Eastern Division, and the United States Court of Appeals for the Seventh Circuit, that the concepts advanced by the *Polk* Appellate Court decision governing public administrative agencies, by analogy, also should apply to private administrative agencies that are governed by contractual due process.

That such an analogy has merit is supported by *Duldulao v. St. Mary of Nazareth Hospital*, wherein the Illinois Supreme Court applied contractual due process concept of *Kaiser v. Dixon*, involving public employee, as being applicable to a private employee, Duldulao, as an employee of St. Mary of Nazareth Hospital.

Because of the above analysis, the respondents, as hearing officers, could not properly perform quasi-prosecutorial investigative functions. Nevertheless, they did perform such quasi-prosecutorial investigative functions, as is substantiated by Hoite C. Caston's affidavit, pages 9, 10, and 11, attached to the respondent's motion for summary judgment, referring to the oral complaints, which the respondents admittedly refused to reduce to written charges.

Those oral charges reflect that the respondents, as decision makers, conducted a quasi-prosecutorial investigation, as is reflected in Hoite C. Caston's affidavit, particularly those oral charges stated on page 10 and enumerated herein:

1. At the same time, you have driven a wedge of suspicion and mistrust between the Trustees and the Foundation staff by openly discussing the Trustees individually and as a group in unflattering, profane and obscene terms.
2. Likewise, you have driven a wedge between the staff and ACT (The Advisory Committee to the Trustees) by making unfounded accusations of disloyalty against most of its members, sowing seeds of distrust and suspicion.
3. You have also attempted to drive a wedge between the Trustees and ACT, the Foundation's most loyal and influential supporters, by saying "ACT is history" and unilaterally indicating to the ACT chairperson that the committee was "fired."
4. Potentially most damaging of all, your conduct has driven a wedge between the readership and the Foundation by imposing your personal loyalty test in which those not in 100% agreement with us are against us, thus further alienating potential supporters by openly expressing distrust and suspicion in letters and phone calls that are often marked by angry outbursts. This has not only discouraged reader support but has also created growing animosity toward the Foundation.

Examining closely the above oral charges, wherein there are allegations about "openly discussing the Trustees . . . in unflattering, profane and obscene terms," "making unfounded accusations of disloyalty against most of its members, "saying 'ACT is history'," openly ex-

pressing distrust and suspicion in letters and phone calls," these would be considered hearsay, unless subjected to an evidentiary hearing consisting of cross-examination, and therefore are not admissible in an administrative public proceeding (*Polk*, at 536).

That the principle of hearsay would apply in this matter is supported by an affidavit that Hoite C. Caston had attached in the respondents' motion for summary judgment before the United States District Court for the Northern District of Illinois, Eastern Division, wherein Hoite C. Caston submitted an affidavit with an Exhibit B, 19-3, wherein in the last paragraph of that exhibit, Hoite C. Caston emphasizes the requirement of evidence to support charges against any person in conjunction with the principles of the Urantia Book, which certainly would not involve the concept of hearsay.

As in *Polk* (at 540-541), wherein Polk's legal counsel objected to the presence of two trustees of the pension board, based upon prejudice, similarly, in this matter, the petitioner objected to Keeler's presence as a hearing officer because of prejudice against the petitioner concerning the 22-page Keeler document. In *Polk*, the court ruled that the two pension hearing police officers should have recused themselves on the basis that "a fair trial and a fair tribunal is a basic requirement of due process."

In this instance, by the *Polk* analogy, Keeler should have been recused as a hearing officer in order to achieve "a fair trial and a fair tribunal," which principle of due process is reflected in the policy of the Declaration of Trust, its By-Laws, and the Urantia Foundation teachings.

Such a principle of fair trial and fair tribunal is acknowledged in the previously addressed Hoite C. Caston affidavit, with an Exhibit B, 19-1, paragraphs 3 and 5, bearing the signature of Hoite C. Caston, which, when referring to another matter involving the petitioner, states:

> To say that I am greatly saddened and deeply disturbed by your choice of action is an understatement. As Martin's friend, it hurts me to see the personal pain caused him by this patently unfair and distorted assault on his character and, through him, the integrity and independence of the Urantia Foundation. As a trustee of Urantia Foundation and a member of Urantia Brotherhood, I am outraged at this perversion of justice by the Executive Committee. I cannot see how anyone could, in good conscience, characterize as "thoughtful deliberation" the actions of a self-styled inquisition that was convened under lynch mob mentality; that considered unfounded rumors, personal assumptions, hearsay, and one-sided testimony as "evidence"; and that took it upon itself to be prosecutor, judge, and jury with a predetermined verdict of "guilty as charged." Such behavior would not even meet the most minimal standards of the Brotherhood's own removal procedure, much less the spiritual standards you seek to impose on Martin's actions.
>
> Where was there any sense of fairness in this whole process?
>
> Who were Martin's accusers and what specifically did they say?

Based upon Hoite C. Caston's remarks as found in his affidavit, with Exhibit B, 19-1, paragraphs 3 and 5, Hoite C. Caston recognizes that, under § 187, j, of Restatement (Second) of the Law of Trusts, trustees' decision are subject to the review of a court for dishonest action, bad

faith, unreasonable and arbitrary exercise of judgment, or improper motive.

Contrary to the conclusions of the United States District Court for the Northern District of Illinois, Eastern Division, and the United States Court of Appeals for the Seventh Circuit, the trustees' prerogatives under paragraph 7 are not without limitation, pursuant to the cited language of § 187, j, Restatement (Second) of the Law of Trusts.

Also, the Restatement (Second) of the Law of Trusts provides:

> It is true that the good faith requirement may be waived by the words of the trust, *but the words are interpreted narrowly.* Words found to waive the reasonableness standard are "absolute" or "unlimited" or "uncontrolled" discretion. Rest. 2d Trust § 187, comment j, pg. 408. (Emphasis supplied.)

Article VII makes no such waiver, and the trustees in exercising the removal power are held to the presumed high standards of reasonableness, reasoned judgment, loyalty, good faith, and proper motive—all consistent with, and in fulfillment of, the inspired precepts of Article II, including the consummate teachings of the Urantia Book. The court will control the trustees if they abuse their fiduciary powers. *May v. May*, 167 U.S. 309 (1897). *See also* Rest. 2d Trusts § 187, comment g, p. 404.

Certainly, the respondents, herein, abused their power by not affording the petitioner written charges as provided by the teachings of the Urantia Foundation.

Furthermore, K. Richard Keeler should not have remained on the board because there was a serious concern

about whether he could be impartial or not, and pursuant to the concepts of the Illinois Appellate Court decision of *Polk*, Keeler should have been either recused or removed by the other trustees.

Additionally, the trustees could not have served both as investigators and hearing officers, based upon the Illinois Appellate Court *Polk* decision.

Granted, the *Polk* decision concerned a public agency governing public employees, nevertheless the concept advanced by the petitioner was recognized as a valid one, pursuant to the United States District Court for the Northern District of Illinois, Eastern Division, decision, page 10, wherein the court denied the respondents' motion for judgment on the pleadings by recognizing that the petitioner had advanced the legal proposition "the Declaration of Trust incorporates many of the procedural safeguards embodied in the due process clause, and that the defendants' failure to abide by these procedures in ousting him as a trustee constituted a breach of the trust. (Amended Compl., ¶ 25)."

Moreover, the concept of contractual due process has previously been recognized in the Seventh Circuit in reference thereto in *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987), at 1198.

Therefore, the United States District Court for the Northern District of Illinois, Eastern Division, decision, and the United States Court of Appeals for the Seventh Circuit decision, in affirming the lower court's decision for granting a summary judgment, were inappropriate as there is a genuine issue of material fact, and the respondents are not entitled to a summary judgment as a matter of law.

CONCLUSION

For the above-stated reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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INDEX TO APPENDICES

PAGE

A—Opinion of the United States Court of Appeals for the Seventh Circuit, April 9, 1996 ..... A-1

B—Denial of Petition for Rehearing by the United States Court of Appeals for the Seventh Circuit, May 6, 1996 ..... B-1

C—Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, May 9, 1995 ..... C-1

APPENDIX A

[UNPUBLISHED ORDER NOT TO
BE CITED PER CIRCUIT RULE 53]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued November 28, 1995
April 9, 1996

Before

Hon. Daniel A. Manion, *Circuit Judge*
Hon. Ilana D. Rovner, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

MARTIN W. MYERS,

Plaintiff-Appellant,

No. 95-2344 *v.*

THOMAS C. BURNS, HOITE C.
CASTON, K. RICHARD KEELER,
Trustees of Urantia Foundation, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 927—**Ann Claire Williams,** *Judge.*

ORDER

Martin W. Myers, a former trustee of the Urantia Foundation, sought a declaration that the other trustees

improperly removed him from the Urantia's Board of Trustees. The district court granted defendants summary judgment. Myers appeals. We affirm.

The Urantia Foundation is a charitable not-for-profit trust created in 1950 pursuant to a Declaration of Trust to promote the principles, teachings and doctrines of the Urantia Book.[1] The Declaration of Trust provided that the Trust Estate "shall be managed by a Board of Trustees."

Martin W. Myers was one of the five trustees of the Urantia Foundation from 1972 until 1993. In 1992 and 1993, the defendants, who are the other four trustees, unanimously voted at three consecutive quarterly meetings to remove Myers as a co-trustee of the Foundation. In an affidavit submitted in support of defendants' motion for summary judgment, co-trustee Caston averred that Myers was removed because of his "unprofessional outbursts," "attacks and vendettas against Board members," "angry and unprofessional abrupt exits from Board meetings," and "derogatory remarks and characterizations about . . . fellow Trustees."

Shortly after his removal from the Board, Myers filed suit in the Circuit Court of Cook County alleging that he was improperly removed. The defendants removed the case to federal court based on diversity of citizenship and a controversy in excess of $50,000. The defendants then moved for summary judgment, asserting that Myers' removal was proper because the unambiguous terms of the Declaration of Trust allowed the removal of a trustee "for

---

[1] The Urantia Book is described as "religious revelation[s]" of "epochal significance."

any reason by a unanimous vote of the remaining trustees. . . ." The district court agreed with the defendants and granted them summary judgment. We also agree.

Section 7.5 of the Declaration of Trust governs the removal of trustees from the Urantia Board of Trustees and provides:

> 7.5 REMOVAL OF TRUSTEE: Any Trustee may be removed for any reason by a unanimous vote of the remaining Trustees, and upon the casting of such a unanimous vote of the remaining Trusses, they shall thereupon execute a certificate under the hands and seals of said remaining Trustees certifying to the casting of such vote and to the removal of such Trustee, and the same shall be filed for record as provided in paragraph 9.1. Upon the execution and recordation of such certificate, a vacancy in the number of Trustees shall be deemed to exist.

The undisputed evidence presented by the defendants in support of their motion for summary judgment demonstrated that the trustees voted unanimously, not once but three times, to remove Myers. The undisputed record also evidences that the general counsel filed a certificate of removal as required by the Declaration of Trust. Thus, the procedure for removing Myers conformed with the Declaration of Trust. Under Illinois law courts are obligated to carry out the stated intent of the settlor of a trust. *First Nat'l Bank of Chicago v. Canton Council of Campfire Girls, Inc.*, 426 N.E.2d 1198, 1201 (Ill. 1981) ("The court's primary concern in construing a trust is to discover the settlor's intent, which the court will effectuate if it is not contrary to law or public policy."); *Ford v. Newman*, 396 N.E.2d 539, 540 (Ill. 1979) (intent of settlor should be ascertained, where possible, from the trust instrument itself).

On appeal, Myers presented a myriad of arguments as to why the district court erred and why his removal was improper. However most of his voluminous arguments and the documents supporting them focus on the reasons why the other trustees wrongly voted to terminate him. While he obviously disputes the distasteful facts leading up to his discharge, it is not the duty of this court to sort out the unfortunate facts surrounding this dispute. Rather, we look only at whether the terms of the trust were properly executed. The only argument meriting any mention concerns Urantia's By-Laws. The Urantia By-Laws were adopted by the Trustees pursuant to section 7.6 of the Declaration of Trust which provided that the trustees "shall adopt by-laws . . . for the government of the Foundation and of the acts and procedures of the trustees." Section 2.4 of the By-Laws addressed the issue of removal of trustees and provides:

> When, in the opinion of a majority of the Trustees, any Trustee has failed or refused to assume and perform his duties and responsibilities, or has done or permitted any act or thing which is inconsistent with or in degradation of the teaching of The Urantia Book, or by his acts or omissions has brought disrepute upon himself or URANTIA FOUNDATION, then, the Trustees shall cast a ballot on the question of whether or not such Trustee should be removed. Such ballot shall be cast at the first regular quarterly meeting of the Board of Trustees next succeeding the meeting at which the determination aforesaid shall have been made. A ballot on the question of whether or not such Trustee shall be removed shall be cast again at each of the next two regular quarterly meetings at which all of the other Trustees shall be present. If all of the Trustees other than the Trustee whose removal is being considered shall cast a ballot

> at each successive meeting as aforesaid for the removal of such Trustee, then said other Trustees shall executed a Certificate of Removal certifying to the removal of such Trustee, which certificate shall be in the following form:

Here the Certificate of Removal acknowledges the unanimous vote for removal and states that removal occurred after "due deliberation and the exercise of fair and impartial judgment. . . ."

Myers interprets the By-Laws differently. Based on Section 2.4 of the By-Laws and the Certificate's statement that the trustees acted with "fair and impartial judgment" in removing the trustee, Myers contends that he could only be removed as a trustee for "cause" and then only after a full-blown, trial-like hearing. But Myers' interpretation of the By-Laws conflicts with the unambiguous language of the Declaration of Trust which provides for removal "for any reason." And Article 7.6 of the Declaration of Trust only authorizes the trustees to adopt By-Laws which are "not inconsistent with the provisions of th[e] Declaration of Trust." Myers' suggested reading would directly conflict with the Declaration of Trust. Also the By-Laws do not require any specific procedures for the removal hearing. To the extent that the By-Laws required certain procedures, the defendants presented uncontroverted evidence that they voted unanimously at three consecutive quarterly meetings to remove Myers from the Board of Trustees. Myers' removal was therefore proper and summary judgment appropriate. *Stratmeyer v. United States*, 67 F.3d 1340, 1345 (7th Cir. 1995) (we shall affirm the district court's summary judgment if there is no genuine issue of material fact and if the movant is entitled to judgment as a matter of law);

Ford, 396 N.E.2d at 541 (affirming grant of summary judgment where trust instrument resolved dispute).

Myers attempts to draw the court into his dispute with the Urantia Foundation by referencing several distasteful controversies involving him and other trustees. We need not involve ourselves with the personality conflicts that led to Myers' removal. We need only apply the trust documents. That application is straightforward; the Board of Trustees complied with the Declaration of Trust and the By-Laws in removing Myers as a trustee. Accordingly, the district court's decision is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 6, 1996

Hon. Daniel A. Manion, *Circuit Judge*
Hon. Ilana D. Rovner, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

MARTIN W. MYERS,

Plaintiff-Appellant,

No. 95-2344 *v.*

THOMAS C. BURNS, HOITE C. CASTON, K. RICHARD KEELER, Trustees of Urantia Foundation, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 927—**Ann Claire Williams,** *Judge.*

ORDER

On consideration of the Petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Plaintiff-Appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

MARTIN W. MYERS **JUDGMENT IN A CIVIL CASE**

v.

THOMAS C. BURNS,
et al CASE NUMBER: 94 C 927

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the court's memorandum opinion and order entered May 09, 1995, defendants motion for judgment on the pleadings is denied and the alternative motion for summary judgment is granted.

Date: May 9, 1995

H. Stuart Cunningham
Clerk

(By) Deputy Clerk

C-2

[Dated May 9, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 94 C 927

MARTIN W. MYERS,

Plaintiff,

v.

THOMAS C. BURNS, HOITE C. CASTON, K. RICHARD KEELER, PATRICIA SADLER MUNDELIUS, Trustees of the Urantia Foundation, and PHILIP A. ROLNICK, an individual represented to be a newly elected Trustee,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Martin W. Myers is a former trustee of the URANTIA Foundation. Myers seeks a declaration that he was improperly removed as a trustee of the URANTIA Foundation, and a court order reinstating him as a trustee. Defendants are the current trustees of the URANTIA Foundation. This case is presently before the court on defendants' Motion for Judgment on the Pleadings and Alternative Motion for Summary Judgment. For the reasons stated below, defendants' Motion for Judgment on the Pleadings is denied and the Alternative Motion for Summary Judgment is granted.

Background

The URANTIA Foundation is a charitable Illinois not-for-profit common law trust created in 1950 to educate man about his relation to God and the Universe, and to promote the principles, teachings, and doctrines of the URANTIA Book. (Decl. of Trust, Art. II). In 1992 and 1993, defendants (with the exception of newly appointed trustee Philip A. Rolnick) unanimously voted at three consecutive quarterly meetings to remove Myers as a co-trustee of the Foundation. In an affidavit submitted in support of defendants' motion for summary judgment, defendant Caston asserts that Myers was removed because of *inter alia*: (1) his "unprofessional outbursts," (2) "attacks and vendettas against Board members," (3) angry and unprofessional abrupt exits from Board meetings," and (4) "derogatory remarks and characterizations about . . . fellow Trustees." (Aff. of Hoite C. Caston, Para. 17). Myers' fellow trustees did not provide him with a written copy of any formal "charges" before voting to remove him. According to defendant Caston, "The Trustees decided that they would consider the question of removal in informal private discussions at the quarterly meetings." (Caston Aff., para. 14).

Shortly after his removal, Myers filed the instant suit in the Circuit Court of Cook County, alleging that defendants' failure to provide him with a formal "due process hearing" constituted a breach of the express and implied terms of the governing Declaration of Trust. The case was removed to this court in February 1994.

Discussion

I. *Motion for Judgment on the Pleadings*

A. *Standing*

Defendants' primary argument in support of their motion for judgment on the pleadings relates solely to Myers' standing to bring this suit. "Standing is the aspect of justiciability that focuses on the qualifications of the party bringing the suit; the essence of the inquiry is 'whether the litigant is entitled to have the court decide on the merits of the dispute or of particular issues.' " *Frank Rosenberg, Inc. v. Tazewell County*, 882 F.2d 1165, 1168 (7th Cir. 1989) (quoting *Warth v. Seldin*, 422 U.S. 490 (1975)). As defendants properly note, standing is a threshold issue. If Myers lacks standing to bring this action, this court has no power to adjudicate the merits of the dispute. *Warth*, 422 U.S. at 498.

Defendants challenge Myers' standing on the ground that, as a general rule, only the Illinois Attorney General can bring suit to enforce the terms of Illinois charitable trusts. This proposition finds wide, long-standing support in the case law. *See, e.g., Art Institute of Chicago v. Castle*, 133 N.E.2d 748 (Ill. App. 1956); *Courtney v. Wilson*, 63 N.E.2d 794 (Ill. App. 1945). As the court explained in *Castle*, 133 N.E.2d at 751, this rule recognizes the attorney general's special role as the defender of the people's interests, and serves to protect charities from "the vexation, delay and expense" that would inevitably occur if mere membership in the community at large allowed one to maintain a suit for the enforcement of a charitable trust.

In *Castle*, the National Sculpture Society, a group of sculptors, sought to enforce a $1 million charitable trust

created to finance the erection and maintenance of statutes and monuments through Chicago. *Castle*, 133 N.E.2d at 749-50. The sculptors challenged the trustees' plan to use trust funds to finance the construction of an annex to the Chicago Art Institute. According to the sculptors, the planned expenditure violated the express terms of the trust, and would deprive their members of the opportunity to profit from the erection of the statues and monuments contemplated by the grantor. *Id.* at 750-51. The court denied the sculptors' petition for leave to intervene, noting that "no individual seeking purely personal gains has any right in a suit involving the enforcement of a charitable trust," and that as the "authorized representatives of the people," the state's attorney and the attorney general had the exclusive right to control the case. *Id.* at 751 (citing *Courtney*, 63 N.E.2d 794).

Courtney, relied on heavily by the *Castle* court, has a similar theme. There, an artist sought to enforce a charitable trust created to provide for the construction of a memorial to Alexander Hamilton. *Courtney*, 63 N.E.2d at 795-80. Having previously worked with the grantor on the project, the artist was well positioned to receive the commission for the memorial. When the trustees ultimately abandoned the artist's plan, the artist sought a court order obligating the trustees to complete the memorial. *Id.* at 799-8. In rejecting the artist's claim, the court explained that as a private citizen seeking merely to further a personal cause, he had no right to maintain a proceeding to enforce or interfere in a charitable trust created to benefit the people generally. *Id.* at 800.

Unlike the plaintiffs in *Castle* and *Courtney*, Myers purports to bring suit as a co-trustee exercising his fiduciary duty to redress breaches of the charitable trust

he was charged with administering. Courts and legal scholars have long agreed that trustees have standing to enforce charitable trusts notwithstanding the attorney general's special role as protector of the people's interests in those trusts. *See, e.g., Holt v. College of Osteopathic Physicians and Surgeons*, 394 P.2d 932, 935-36 (Cal. 1964); *Takabuki v. Ching*, 695 P.2d 319, 327 (Haw. 1985); *Ball v. Mills*, 376 So.2d 1174, 1182 (Fla. App. 1979). "It is clear . . . that where there are several trustees one of them may maintain an action against the others to enforce the trust or to compel the redress of a breach of trust." IVA William R. Fratcher, *Scott on Trusts*, § 391 (4th ed. 1989). *See also Stuart v. Continental Illinois Nat'l Bank and Trust Co.*, 369 N.E.2d 1262 (Ill. 1977) (authorizing attorneys fees to be paid out of trust in suit between co-trustees); Restatement (Second) of Trusts § 391, cmt. b (1959) ("[a] suit for the enforcement of a charitable trust can be maintained by one or more of several trustees against the other trustees").

The distinction drawn by courts between efforts by private citizens to secure benefits from charitable trusts and enforcement actions brought by trustees is an important one. Unlike the public at large, trustees have a duty to ensure the proper administration of their trusts, and can even be held liable for failing to prevent certain breaches. *Ball*, 376 So.2d at 1181. " 'The charity's own representative has at least as much interest in preserving the charitable funds as does the Attorney General who represents the general public. The co-trustee is also in the best position to learn about breaches of trust and to bring the relevant facts to a court's attention.' " *Holt*, 394 P.2d at 936 (quoting Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73

Harv. L. Rev. 433 (1959)). While concerns regarding vexatious litigation are certainly valid in the context of suits by the public at large, these considerations simply do not apply to enforcement actions by trustees who are, of course, limited in number. *Id.*

Defendants argue, in the alternative, that even if co-trustees generally have standing to sue to enforce charitable trusts, no such standing exists here where plaintiff seeks "purely personal gain"—namely, his reinstatement as a trustee of the URANTIA Foundation. The court disagrees. As an initial matter, the court has found no cases similarly limiting trustees' authority to redress alleged breaches of trust. The cases cited by defendants, *Castle* and *Courtney*, discuss plaintiff's personal motivations in the context of suits brought by members of the general public, not enforcement actions brought by individuals charged with the specific task of administering and safeguarding a charitable trust. Moreover, as Myers notes, what defendants characterize as a selfish attempt to hold onto Myers' position as a trustee can be just as easily described as a well-intentioned effort to redress an equally opportune effort by the defendants to wrest control of the foundation in violation of the express terms of the trust. In the court's view, any limitation on standing that requires courts to scrutinize the personal motives of the enforcing trustee would be unworkable. The fact that plaintiff has alleged, and seeks to redress, defendants' breach of specific terms of the trust provides him with sufficient standing to maintain this suit.

Finally, the court rejects defendants' assertion that their removal of Myers as a trustee divested him of any standing to enforce the trust. Myers alleges that his purported removal violated the terms of the trust, and was

therefore ineffective. If he is right, and for purposes of standing, the court will assume that he is,[1] he is still a trustee and has standing to maintain this suit.

B. *Absence of State Action*

Defendants move for judgment on the pleadings on the ground that because Myers has failed to allege state action, he cannot prevail on his "procedural due process" claims. This argument also fails.

As noted above, Myers' entire case is predicated on his claim that the terms of the charitable trust mandate certain procedures for removal of trustees. Although the parties loosely refer to the claim as one for "contractual," and, alternatively, "procedural" due process, the due process clauses of the United States Constitution are not directly implicated by this action. As his Amended Complaint makes clear, Myers merely alleges that the Declaration of Trust incorporates many of the procedural safeguards embodied in the due process clause, and that defendants' failure to abide by these procedures in ousting him as a trustee constituted a breach of the trust. (Amended Comp., ¶25). State action is simply not an element of Myers' claim. Defendants' motion for judgment on the pleadings is denied.

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[1] "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth*, 422 U.S. at 501.

II. *Alternative Motion for Summary Judgment on Amended Complaint*

Defendants have also filed a motion for summary judgment, arguing that their removal of Myers complied with the express, unambiguous terms of the Declaration of Trust. The court agrees, and grants summary judgment in favor of defendants.

"The court's primary concern in construing a trust is to discover the settlor's intent, which the court will effectuate if it is not contrary to law or public policy." *First Nat'l. Bank of Chicago v. Canton Council of Campfire Girls, Inc.*, 426 N.E.2d 1198, 1201 (Ill. 1981). Under Illinois law, intent is to be ascertained if possible, from the instrument itself. *Ford v. Newman*, 396 N.E.2d 539, 540 (Ill. 1979); *In re Estate of Steward*, 480 N.E.2d 201, 203 (Ill. App. 1985).

Here, the Declaration of Trust is unambiguous regarding the removal of trustees:

> 7.5 REMOVAL OF TRUSTEE: Any trustee may be removed *for any reason* by a unanimous vote of the remaining Trustees, and upon the casting of such a unanimous vote of the remaining Trustees, they shall thereupon execute a certificate under the hands and seals of said remaining Trustees certifying to the casting of such vote and to the removal of such Trustee, and the same shall be filed for record . . . .

(Declaration of Trust, Para. 7.5) (emphasis added). It is undisputed that the remaining trustees voted unanimously, not once, but several times, to remove Myers. Under the express terms of the trust, nothing more was required of them to remove Myers as a trustee for the Urantia Foundation. *Cf. Scott on Trusts* Section 107.2. "Where the power of removal is conferred without limi-

tation, it is unnecessary for the person exercising the power to show cause for the removal."

Citing Article II of the Declaration of Trust, plaintiff asserts that the removal powers of the trustees must be exercised in accordance with the guiding principals of the Urantia Foundation. Article II of the Declaration of Trust sets forth the "principal" and "concordant" objects of the Foundation. The two paragraphs that comprise this section of the trust instrument describe the Foundation's purposes in the most general of terms, and by no means can be read to alter the specific removal provision set forth in Article VII.

Somewhat more persuasively, Myers also cites section 2.4 of the By-Laws of the Urantia Foundation, which unlike Article II of the Declaration of Trust, does specifically address the removal of trustees. Section 2.4 provides:

> When, in the opinion of a majority of the Trustees, any Trustee has failed or refused to assume and perform his duties and responsibilities, or has done or permitted any act or thing which is inconsistent with or in degradation of the teaching of THE URANTIA BOOK, or by his acts or omissions has brought disrepute upon himself or URANTIA FOUNDATION, then, the Trustee shall cast a ballot on the question of whether or not such Trustee should be removed. Such ballot shall be cast at the first regular quarterly meeting of the Board of Trustees next succeeding the meeting at which the determination aforesaid shall have been made. A ballot on the question of whether or not such Trustee shall be removed shall be cast again at each of the next two regular quarterly meetings at which all of the other Trustees shall be present. If all of the Trustees other than the Trustee whose removal is being considered shall cast a ballot at each successive meeting as aforesaid for the re-

> moval of such Trustee, then said other Trustees shall execute a Certificate of Removal certifying to the removal . . . .

(By-Laws, Sec. 2.4). In the model certificate of removal alluded to in section 2.4 of the by-laws, the remaining trustee must affirm that the vote of removal was taken "after due deliberation and the exercise of fair and impartial judgment." *Id.* Myers argues that section 2.4 narrows the unfettered removal discretion granted to the remaining trustees in the Declaration of Trust, requiring the trustees to hold a full "due process hearing" replete with formal written charges, supported by specific, substantiated evidence. (Pl. Response at 5-11).

There are two problems with this argument. First, even if the by-laws could be read as restrictively as plaintiff suggests, the Declaration of Trust, not the by-laws, is controlling. Article 7.6 of the Declaration of Trust authorizes the trustees to adopt by-laws "not inconsistent with the provisions of th[e] Declaration of Trust." In the court's view, the imposition of the restrictive procedural requirements suggested by plaintiff would be patently inconsistent with the broad, essentially unfettered, removal powers conveyed by Article 7.5 of the trust instrument.

The court also disagreed with plaintiff's reading of the applicable section of the by-laws. While the by-laws do appear to limit the substantive grounds on which a trustee can be removed, section 2.4 does not provide "removed" trustees with any additional procedural safeguards, other than the requirement that the remaining trustees vote for removal at three consecutive meetings. No mention is made of the necessity for formal written charges, or a special hearing affording the trustee with

an opportunity to plead his case. Under Illinois law, the court is not free to add any restrictions or limitation on the trustees' powers not specified in the trust instrument itself. *Gorin v. McFarland*, 247 N.E.2d 620, 622 (Ill. App. 1969).

Finally, the court is unpersuaded by Myers' references to the procedures afforded the only other URANTIA trustee to have been removed pursuant to the remaining trustees' Article 7.5 powers. While the "custom and practice" of contracting parties is sometimes useful for interpreting ambiguous contract provisions, this kind of evidence provides little guidance in interpreting trust instruments. Here, it is the *settlor's* intent, not the intent of the trustees that must be determined. At best, evidence of the customs and practices of past trustees simply provides the court with insight into the trustees' understanding of the settlor's intentions. However, as the court recognized in *Gorin v. McFarland*, *supra*, the trustees' understanding of the settlor's intent is not controlling. "[W]hatever may have been the belief or whatever may have been the practice, neither acquire immortality unless immortality is given them in the instrument creating the trust."[2] This is especially true here where the trust instrument is unambiguous and plaintiff's "custom and usage" argument hinges on a single prior instance of removal. Finding that the removal of Myers, following a unanimous vote of the remaining trustees,

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[2] *Id.* At 622. Plaintiff in *Gorin* unsuccessfully sought to challenge a majority trustee vote on the grounds that for the prior 25 years all trustee decisions had been made on the basis of unanimous votes. The court rejected the challenge after noting that nothing in the trust instrument required the trustees' self imposed restriction on their previous exercises of power. *Id.*

complied with all of the requirements of the governing trust instrument, the court grants summary judgment in favor of the defendants.

Conclusion

For the foregoing reasons, defendants' Motion for Judgment on the Pleadings is denied and the Alternative Motion for Summary Judgment in granted. As previously noted, the allotted time for appeal begins to run with the entry of this Memorandum Opinion and Order.

ENTER:

/s/ Ann Claire Williams

Ann Claire Williams, Judge
United States District Court

Dated: May 9, 1995

FILED
SEP 5 1996
CLERK

No. 96-193

In The

Supreme Court of the United States

October Term, 1995

MARTIN W. MYERS,

Petitioner,

vs.

THOMAS C. BURNS, HOITE C. CASTON, K. RICHARD KEELER, PATRICIA SADLER MUNDELIUS, Trustees of the Urantia Foundation, and PHILIP A. ROLNICK, an individual represented to be a newly elected Trustee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

1. Whether Illinois law requires the trustees of a private trust to do anything more than comply with the terms of the trust when removing a trustee?

2. Whether the due process clauses of the United States Constitution apply to the actions of the trustees of a private trust?

PARTIES TO THE PROCEEDING

All parties to the proceeding are correctly named in the caption of the case. However, Respondents disagree with Petitioner's characterization of Respondent Phillip A. Rolnick's status as an "individual represented to be a newly elected Trustee." Respondent Phillip A. Rolnick is a duly elected Trustee of the URANTIA Foundation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iii
Counterstatement of the Case	1
Proceedings Below	4
Reasons for Denying the Writ	6
I. The lower courts correctly applied Illinois law.	8
II. There is no legal basis for Petitioner's theory of "contractual due process"	9
III. The due process clauses of the United States Constitution do not apply to the actions of the trustees of a private trust.	15
Conclusion	16

TABLE OF CITATIONS

Cases Cited:

Bean v. Norfolk & Western Ry. Co., 84 Ill. App. 3d 395, 405 N.E. 2d 418 (1980)	14

Contents

Page

Braxton v. United States, 500 U.S. 344, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991) 1

Clift v. UAW, 818 F.2d 623 (7th Cir. 1987) 15

Consolidated Bearings Co. v. Ehert-Krahn Corp., 913 F.2d 1224 (7th Cir. 1990) 14

Duldulao v. St. Mary of Nazareth Hospital, 115 Ill. 2d 482, 505 N.E. 2d 314 (1987) 12

Estate of Steward, 480 N.E. 2d 203 13

First Nat'l. Bank of Chicago v. Canton Council of Campfire Girls, Inc., 85 Ill. 2d 507, 426 N.E. 2d 1198 8

Ford v. Newman, 77 Ill. 2d 335, 396 N.E. 2d 539 (1979) 8

Gorin v. McFarland, 108 Ill. App. 2d 348, 247 N.E. 2d 620 (1969) 8, 13

Hill v. Norfolk and Western Ry. Co., 814 F.2d 1192 (7th Cir. 1987) 12

In re Estate of Steward, 134 Ill. App. 3d 412, 480 N.E. 2d 201 (Ill. App. 1985) 8

May v. May, 167 U.S. 309 (1987) 10, 11

Contents

Page

National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988) 15

Polk v. Board of Trustees of Police Pension Fund of City of Park Ridge, Illinois, 253 Ill. App. 3d 525 (1st Dist. 6th Div. 1993) 13

Robinson v. Ada S. McKinley Community Services, 19 F.3d 359 (7th Cir. 1994) 12

Shelley v. Kramer, 334 U.S. 1, 92 L. Ed. 2d 1161, 68 S. Ct. 449 (1948) 15

Steger v. Northen, 229 Ill. App. 529 (1 Dist. 1923) 11

Stuart v. Continental Ill. Nat. Bank & Trust, 68 Ill. 2d 502, 369 N.E. 2d 1262 (1977) 8

Statute Cited:

Illinois Charitable Trust Act, S.H.A. § 760 ILCS 55/1, *et seq.* 1

United States Constitution Cited:

Fifth Amendment 9, 12, 13, 15

Fourteenth Amendment 9, 12, 13, 15

Contents

Page

Rule Cited:

Supreme Court Rule 10 ..... 1, 16

Other Authorities Cited:

G.C. Bogert, *The Law of Trusts and Trustees*, § 520 10

W. Flatcher, *Scott on Trusts*, § 107.2 10

The URANTIA Book 3, 6

I

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari because this case does not implicate any of the considerations governing review on certiorari which are set forth in Rule 10 of the Court's Rules. This Court has emphasized that the "principal purpose for certiorari is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of *federal law*." *Braxton v. United States*, 500 U.S. 344, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991) (emphasis added); Rules of the Supreme Court, Rule 10. This case does not present a conflict among the circuit courts or state courts as to the meaning of federal law. Indeed, this case has nothing to do with federal law. As explained below, the Northern District of Illinois and the Seventh Circuit correctly dismissed Petitioner's complaint after they applied settled principles of Illinois trust law to the undisputed material facts of this case.

COUNTERSTATEMENT OF THE CASE

The URANTIA Foundation is a charitable common law trust within the meaning of the Illinois Charitable Trust Act, S.H.A. § 760 ILCS 55/1, *et seq.* It was created in 1950 by anonymous contributors pursuant to a Declaration of Trust. The Foundation is governed by a Board of Trustees. In the Declaration of Trust, the contributors empowered the trustees to remove a fellow trustee "for any reason." Section 7.5 of the Declaration of Trust provides:

> 7.5 REMOVAL OF TRUSTEE: *Any Trustee may be removed for any reason* by a unanimous vote of the remaining trustees, and upon the casting of such a unanimous vote of the remaining trustees, they shall thereupon execute a certificate under the hands and seals of said remaining trustees

> certifying to the casting of such vote and to the removal of such trustee, and the same shall be filed for record as provided in paragraph 9.1. Upon the execution and recordation of such certificate, a vacancy and the number of trustee shall be deemed to exist.

The contributors also directed the trustees to "adopt by-laws, not inconsistent with the provisions of [the] Declaration of Trust, for the government of the Foundation and of the acts and procedures of the trustees. . . ." Section 2.4 of the By-Laws addresses the issue of removal. It provides for the trustees to "cast a ballot on the question of whether or not such trustee should be removed":

> [w]hen, in the opinion of a majority of the trustees, [a] trustee has failed or refused to assume and perform his duties and responsibilities, or has done or permitted any act or thing which is inconsistent with or in degradation of the teachings of *The URANTIA Book*, or by his acts or omissions has brought disrepute upon himself or URANTIA Foundation. . . .

Section 2.4 further provides that if a majority of the trustees agree that removal is appropriate, they shall vote again at three consecutive, quarterly board meetings. If all the trustees, except the one to be removed, votes for removal at each of the three subsequent meetings, the trustee will be removed. Section 2.4 also states that "[n]o part of the [removal] deliberation . . . shall be included or recorded in the minutes of the meetings of the board of trustees, but the ballot cast at each meeting on the question of whether or not such trustee is to be removed shall be recorded."

There is no requirement in either the Declaration of Trust or By-Laws that the removal candidate be provided "written charges" or "a fair due process hearing," or that any specific procedures must be followed to remove a trustee. The Declaration of Trust instead allows the Foundation's trustees to remove a fellow trustee "for any reason." The By-Laws only require the remaining trustees to vote unanimously in favor of the removal at the three consecutive, quarterly board meetings after they make the initial decision to remove a trustee. Neither of these documents require written "charges" or specify any particular procedures for removing a fellow trustee.

The undisputed material facts concerning the steps taken by Respondents to remove Petitioner from the Foundation's Board of Trustees are summarized in the opinions of the Northern District of Illinois (Appendix C to Petition) and the Seventh Circuit (Appendix A to Petition). Both the district and circuit court opinions explain that Respondents complied with the requirements of the Declaration of Trust and the By-Laws because they made a unanimous decision to initiate Petitioner's removal and subsequently voted unanimously in favor of removal at the next three consecutive board meetings. In fact, the Petitioner's own statement of the case acknowledges that Respondents complied with the requirements of the Declaration of Trust and the By-Laws when they removed Petitioner from the Foundation's Board of Trustees. Nonetheless, Petitioner claims that, based upon "the Urantia Foundation teachings," upon certain passages from *The URANTIA Book*, and upon the manner in which another trustee was removed in 1984, as a matter of "contractual due process," Respondents could not remove him without first providing "written charges" and conducting what Petitioner calls a "fair, due process hearing."

PROCEEDINGS BELOW

On October 25, 1993, Petitioner filed suit in the Circuit Court of Cook County to challenge the decision of Respondents to remove him from the Foundation's Board of Trustees. Respondents removed the case to the United States District Court for the Northern District of Illinois, Eastern Division. The removal was based solely on the district court's diversity of citizenship subject matter jurisdiction because this case does not present any issues of federal law. Respondents subsequently filed their motion for summary judgment based upon the undisputed facts which show that Respondents complied with the unambiguous terms of the Declaration of Trust and the Foundation's By-Laws when they removed Petitioner from the Foundation's Board of Trustees. On May 9, 1995, the district court granted Respondent's motion and rejected Petitioner's contention that he was entitled to a trial-like hearing and other "due process" protections before the other trustees could remove him from the Board of Trustees.

The district court held that, under Illinois law, the only legal issue presented by this case was whether Respondents complied with the terms of the trust when they removed Petitioner from the Foundation's Board of Trustees. (Petition, C-9). The district court found that the Declaration of Trust, which created the URANTIA Foundation, unambiguously permits the removal of a trustee "for any reason by unanimous vote of the remaining trustees" (Petition, C-9), and that the undisputed facts show that Respondents " . . . voted unanimously, not once, but several times, to remove [Petitioner]." (Petition, C-9). In response to Petitioner's claim that Respondents were required to do something more in order to remove him as a trustee, the district court held that "imposition of the restrictive procedural requirements suggested by [Petitioner] would be patently inconsistent with the broad, essentially unfettered, removal

powers conveyed by [the specific removal provision] of the [Declaration of Trust]." (Petition, C-11). The district court also concluded that the Declaration of Trust preempted any additional procedural requirements that Petitioner claimed were imposed by the By-Laws or any other source, and that the By-Laws, in any event, do not require the procedures sought by Petitioner. (Petition, C-11). The district court also held that, under Illinois law, evidence of the procedures followed when on one prior occasion a trustee was removed has no bearing on this case because any specific procedures used when that trustee was removed were not required by the terms of the trust. (Petition, C-12). The district court concluded that Respondents' removal of Petitioner from the Board of Trustees "complied with all the requirements of the governing trust instrument." (Petition, C-12, 13). On this basis, the district court entered summary judgment against Petitioner and dismissed his complaint.

Petitioner subsequently filed his notice of appeal and asked the Seventh Circuit to review the district court's decision. On April 9, 1996, the Seventh Circuit affirmed the district court's judgment in an unpublished opinion and emphasized that ". . . the procedure for removing [Petitioner] conformed with the Declaration of Trust." (Petition, A-3). The Seventh Circuit noted that Petitioner makes "voluminous arguments" which "focus on the reasons why the other trustees wrongly voted to terminate him." (Petition, A-4). The Seventh Circuit concluded that

> While [Petitioner] obviously disputes the distasteful facts leading up to his discharge, it is not the duty of this court to sort out the unfortunate facts surrounding this dispute. Rather, we look only at whether the terms of the trust were properly executed.

(Petition, A-4). The Seventh Circuit agreed with the district court

that it is not appropriate for the courts to review the reasons why Respondents decided to remove Petitioner:

> [Petitioner] attempts to draw the court into his dispute with the Urantia Foundation by referencing several distasteful controversies involving him and other trustees. We need not involve ourselves with the personality conflicts that led to [Petitioner's] removal. We need only apply the trust documents. That application is straightforward; the Board of Trustees complied with the Declaration of Trust and the By-Laws in removing [Petitioner] as a trustee.

(Petition, A-5).

On May 6, 1996, the Seventh Circuit denied Petitioner's petition for rehearing and suggestion for rehearing en banc. Petitioner now files his Petition for Writ of Certiorari and asks this Court to exercise its discretionary jurisdiction to consider the same meritless arguments which already have been soundly rejected by two lower courts.

REASONS FOR DENYING THE WRIT

Petitioner argues that Respondents were required to do far more than comply with terms of the trust when they removed him from the Foundation's Board of Trustees. He goes to great lengths to repeat the same argument that was soundly rejected by both the district court and the court of appeals, namely, that the Declaration of Trust, the Foundation's By-Laws, the "Urantia Foundation teachings," and certain passages from *The URANTIA Book* (including a passage which describes Pilate's refusal to sentence Jesus to death without a trial), when read

together, somehow grant Petitioner a right to "contractual due process." Petitioner argues that this fabricated right to "contractual due process" required Respondents to provide "written charges" and to conduct a "fair, due process hearing" as part of the removal process.

However, as both lower courts correctly held, Petitioner's argument has no basis in fact or law. As explained above, the undisputed evidence is that Respondents, when they removed Petitioner from the Board of Trustees, followed the terms of the trust to the letter, and that the unambiguous language of both the Declaration of Trust and the By-Laws do not require the procedures to which Petitioner claims he is entitled. Moreover, as explained below, both lower courts correctly applied well-settled principles of Illinois trust law to hold that Respondents were only required to comply with the requirements of the trust instrument in removing Petitioner. The reasons for their decision to remove Petitioner are immaterial and are not subject to judicial review. Petitioner also has no legal or factual basis for his theory that "contractual due process" required Respondents to provide him with "written charges" and a "fair, due process hearing" before they removed him from the Board. As explained above, there are simply no such requirements in the trust documents. As explained below, there is no rule of law which requires the trustees of a private trust to hold a trial and to comply with the due process requirements of the United States Constitution when they decide to remove a trustee.

I.

THE LOWER COURTS CORRECTLY APPLIED ILLINOIS LAW.

As emphasized in the opinions of both the district court and the court of appeals, "[t]he court's primary concern in construing a trust is to discover the settlor's intent, which the court will effectuate if it is not contrary to law or public policy." *First Nat'l. Bank of Chicago v. Canton Council of Campfire Girls, Inc.*, 85 Ill. 2d 507, 426 N.E. 2d 1198, 1201. (Petition, C-9, A-3). Illinois trust law provides that, when, as in this case, the terms of the trust instrument are clear and unambiguous, a court must apply the trust document as written and without looking beyond its four corners. *Matter of Estate of Steward*, 134 Ill. App. 3d 412, 480 N.E. 2d 201, 203 (1985); *Ford v. Newman*, 77 Ill. 2d 335, 396 N.E. 2d 539, 540 (1979); *Stuart v. Continental Ill. Nat. Bank & Trust*, 68 Ill. 2d 502, 369 N.E. 2d 1262, 1271 (1977) ("It is axiomatic that the limits of a trustee's powers are determined by the instrument which creates the trust."); *In re Estate of Steward*, 134 Ill. App. 3d 412, 480 N.E. 2d 201, 203 (Ill. App. 1985). *See also First National Bank of Chicago v. Canton Council*, 426 N.E. 2d at 1201. "[I]t is not the function of a court to modify the document or create new terms. . . ." *Steward*, 480 N.E. 2d at 203. Thus, under Illinois law, a court cannot do as Petitioner suggests and impose additional restrictions or limitations which are not required by the trust instrument itself. *Gorin v. McFarland*, 108 Ill. App. 2d 348, 247 N.E. 2d 620, 622 (1969).

The lower courts correctly held that the only legal issue presented by this case is whether Respondents complied with the terms of the Declaration of Trust when they removed Petitioner from the Board of Trustees. As explained above, the undisputed evidence is that Respondents *did* comply with the terms of both the Declaration of Trust *and* the Foundation's By-Laws when

they removed Petitioner from the Board of Trustees. Petitioner continues nonetheless to argue that, despite the fact that there are no specific provisions in either the Declaration of Trust or the By-Laws, which require the procedures he seeks, Respondents were obligated as a matter of "contractual due process" to provide Petitioner with "written charges" and a "fair, due process hearing" before they could remove him from the Board of Trustees. As explained below, Petitioner's concocted theory of "contractual due process" is frivolous and lacks any factual, legal, or logical basis.

II.

THERE IS NO LEGAL BASIS FOR PETITIONER'S THEORY OF "CONTRACTUAL DUE PROCESS".

The apparent premise of Petitioner's so-called "contractual due process" theory is that no party is entitled to exercise its rights under an alleged contract unless it first conducts the kind of "trial" required by the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner's theory is specious for two reasons. First, a trustee of a charitable trust has no right, contractual or otherwise, to serve as a trustee. Second, the cases which Petitioner cites in support of his argument do not mention the term "contractual due process" or recognize any such concept.

The most obvious flaw in Petitioner's argument is the false premise that he possesses a *contractual right* to serve as a trustee. However, under settled principles of trust law, a trustee possesses no *personal* or "contractual" right to remain a trustee. To the contrary, the sole concern of a court of equity in reviewing the administration of a trust is the interest of the *beneficiaries*. Although a court of equity has authority to intervene to prevent abuse of the co-trustees' power to remove an individual trustee,

the concern of the court is for the rights of the beneficiaries of the trust and not for the removed trustee:

> If the power [to remove a trustee] is reserved to the settlor or given to co-trustees, the court of equity will intervene to prevent an abuse of the power. Here the question on which the court must pass, however, is *not* whether there was *cause* for removal, but whether any *beneficiaries* have been injured.

G.C. Bogert, *The Law of Trusts and Trustees*, § 520 at p. 29 (emphasis added). *Accord* W. Flatcher, *Scott on Trusts*, § 107.2, at 124 (the proper function of a court, in reviewing the exercise of the power to remove a trustee, is to "prevent its exercise in such a manner as to prejudice the rights of the *beneficiaries*" [emphasis added]).

Even in cases involving *judicial* removal of a trustee (rather than removal pursuant to the terms of the trust document by other trustees or the beneficiaries), the court's focus is solely on the rights of beneficiaries; the claimed right of the trustee to retain his position is not the issue. As this Court observed in *May v. May*:

> The power of a court of equity to remove a trustee, and to substitute another in its place, is incidental to its paramount duty to see that trusts are properly executed; and may be properly exercised whenever such a state of mutual ill-feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuancy in office *would be detrimental to the execution of the trust*, even if for no other reason than that

> human infirmity would prevent the co-trustees or the beneficiaries from working in harmony with him, and *although charges of misconduct against him are either not made out, or are greatly exaggerated.*

May v. May, 167 U.S. 309, 320 (1987). Thus, even when the judicial removal of a trustee is requested, the trustee has no "personal" or "contractual" right to withstand removal until he is "proven guilty" of some personal wrongdoing. This principle has been adopted in Illinois decisional law. *Steger v. Northen*, 229 Ill. App. 529 (1 Dist. 1923).

Moreover, as this Court recognized almost 100 years ago in *May v. May*, equity courts historically have viewed with suspicion and distaste any effort by a trustee to force himself upon the trust, as Petitioner seeks to do. Both this Court and the Illinois Court of Appeals have cited with approval an early decision of an English Lord Chancellor expressing this view. The Illinois Court of Appeals, describing this Court's opinion in *May v. May*, stated:

> And the court mentioned the case of *Uvedale v. Ettrick*, 2 Cha. Cas. 130, decided by Lord Chancellor Nottingham in 1682, where it appeared that Ettrick (a trustee appointed under a will and whose removal was sought) insisted on continuing in office as trustee, and quoted from the Lord Chancellor: "I like not that a man should be ambitious of a trust, when he can get nothing but trouble by it," and who "declared that, without any reflection on Ettrick, he should meddle no farther in the trust, etc."

Steger v. Northen, 229 Ill. App. at 541.

Because Petitioner has no right, contractual or otherwise, to continue to serve as a trustee, even if there were such a thing as "contractual due process," there is no factual basis for Petitioner's theory that his "contractual" rights were violated by Respondents.

The only legal authority cited in support of Petitioner's concocted theory of "contractual due process" are cases which address the issue of whether provisions of an employee handbook can become enforceable terms of a written employment contract. *See, e.g., Robinson v. Ada S. McKinley Community Services*, 19 F.3d 359 (7th Cir. 1994); *Duldulao v. St. Mary of Nazareth Hospital*, 115 Ill. 2d 482, 505 N.E. 2d 314 (1987). The cases cited by Petitioner hold that, under certain circumstances, procedural requirements included in employee handbooks can become part of a written employment contract. However, the cases cited by Petitioner do not require the application of "due process" in the abstract. In fact, none of the cases cited by Petitioner mention the phrase "contractual due process." The phrase appears to be nothing more than a "buzzword" invented by Petitioner, as evidenced by the fact that the specific case which Petitioner cites as support for his statement that ". . . the concept of contractual due process has previously been recognized by the Seventh Circuit . . ." does not mention the term "contractual due process" or recognize any such concept. (Petition, p. 23); *Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1199 (7th Cir. 1987) (holding that the appellant waived any claim that he had been "denied procedural protections guaranteed him by the collective bargaining agreement" by failing to raise the issue before the public law board). Moreover, none of the cases cited by Petitioner hold that an employer cannot discharge an employee without conducting a "trial" applying the same due process requirements imposed on courts and other governmental decision-makers by the Fifth and Fourteenth Amendments. In short, Petitioner's argument is an

unfounded and frivolous attempt to impose on all private actors the same due process requirements of the Fifth and Fourteenth Amendments as applied to governments actors in *Polk v. Board of Trustees of Police Pension Fund of City of Park Ridge, Illinois*, 253 Ill. App. 3d 525 (1st Dist. 6th Div. 1993).

Furthermore, none of the cases cited by Petitioner were decided under the law of trusts or purported to re-cast the relationship between the trustee and the trust as a contract that the trustee can use to restrict the other trustees in their exercise of the powers granted to them in the trust document. *Gorin v. McFarland*, 247 N.E. 2d at 622. To the contrary, as explained above, a trustee has no right, contractual or otherwise, to serve as a trustee.

Petitioner also repeats his argument that, in removing him, Respondents were "contractually" bound to follow the same procedures used in 1984 in the only other instance in Foundation history in which a trustee was removed. He argues that the lower courts should have imposed the prior procedure as an alleged "custom or practice" which restricts the unfettered removal power granted to the Foundation's trustees by the Declaration of Trust. However, both the district court and the court of appeals correctly held that this argument is foreclosed by the settled principle of trust law discussed above, requiring courts to apply the terms of the trust as written. Under Illinois law, a prior "custom or practice" of trustees, no matter how lengthy or consistent, can *never* limit or alter the powers granted to trustees by the trust document. *Gorin v. McFarland*, 247 N.E. 2d at 622 (trustees' twenty-five year practice of only acting on basis of unanimous vote could not create a *requirement* of unanimity when the trust instrument only required a majority vote); *see also Estate of Steward*, 480 N.E. 2d at 203 (a court cannot modify a trust document or create new terms).

Petitioner's "custom or practice" argument also fails for three additional reasons. First, the evidence of a "custom or practice" is only relevant when a term in a document is ambiguous or unclear. However, as explained above, there is no ambiguity in the trust document at issue in this case. The Declaration of Trust clearly states that the trustees can remove a fellow trustee "for any reason." The fact that the trust document does not require the procedures sought by Petitioner cannot create an ambiguity; it only means that the procedures sought by Petitioner are *not* terms of the trust. *Consolidated Bearings Co. v. Ehert-Krahn Corp.*, 913 F.2d 1224, 1233 (7th Cir. 1990) (the rights of the parties are limited to the terms expressed in a contract). Second, Petitioner's evidence of a "custom or practice" consists of a single prior event. As a matter of Illinois law, a single prior instance is insufficient to establish a "custom or practice." *Bean v. Norfolk & Western Ry. Co.*, 84 Ill. App. 3d 395, 405 N.E. 2d 418, 426 (1980). Third, the alleged "custom or practice" also is irrelevant because it did not exist when the trust was created. For a custom or practice to have any relevance, it must have existed at the time the document being construed was executed, and not after. *Id.* The single instance alleged by Petitioner as evidence of a "custom or practice" occurred in 1984, over 30 years after the Declaration of Trust was executed in 1950.

In sum, Petitioner's claim of "contractual due process" is utterly specious and lacks any factual, legal, or logical foundation.

III.

THE DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION DO NOT APPLY TO THE ACTIONS OF THE TRUSTEES OF A PRIVATE TRUST.

To the extent Petitioner bases his "contractual due process" argument on the due process clauses of the United States Constitution, his argument has no basis in law. It is fundamental that "[a]bsent the requisite *governmental* action, there can be no claim for constitutional due process." *Clift v. UAW*, 818 F.2d 623, 631 (7th Cir. 1987) (emphasis added); *see also National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988); *Shelley v. Kramer*, 334 U.S. 1, 13, 92 L. Ed. 2d 1161, 68 S. Ct. 449 (1948). This Court has consistently emphasized that the due process protections of the Fifth and Fourteenth Amendments "erect no shield against merely private conduct, however discriminatory or wrongful." *Shelley*, 334 U.S. at 13. Because the Foundation is a *private* trust, the due process provisions of the Fifth and Fourteenth Amendments simply do not apply and afford Petitioner no basis for his claim that he is entitled to so-called "contractual due process" protections.

CONCLUSION

The Petition should be denied because this case does not present any issue of federal law and does not implicate any of the other considerations governing the Court's review of a petition for certiorari as set forth in Rule 10 of this Court's Rules. Instead, the record shows that both the district court and the court of appeals correctly applied settled principles of Illinois law to the undisputed material facts of this case.

Respectfully submitted,

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